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In the Supreme Court of the United States

OCTOBER TERM 1948

No. 634 (Misc.)

GEORGE THOMAS,

Petitioner,

vs.

FURNESS (PACIFIC) LIMITED, a corporation, and SHAW, SAVILL & ALBION, LTD., a corporation,

Respondents.

Brief of Respondents in Opposition to Petition for Writ of Certiorari

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Brief of Respondents in Opposition to Petition for Writ of Certiorari

REFERENCE TO THE OFFICIAL REPORT OF THE COURT BELOW

The decision of the District Court was rendered without opinion and is unreported. The opinion of the Court of Appeals of the Ninth Circuit is at 171 F.2d 434. It appears at page 90 of the Transcript of Record.

GROUNDS OF JURISDICTION OF THIS COURT

Jurisdiction to consider the petition for certiorari is conferred by 28 U.S.C.A. Sec. 1254. The judgment of the

Court of Appeals was entered December 22, 1948. By successive orders of a justice of this court made pursuant to 28 U.S.C.A. Sec. 2101, the time to file the petition was extended to May 21, 1949 (R. p. 97). The petition was filed May 20, 1949.

STATEMENT OF THE CASE

Petitioner, a longshoreman, filed a complaint in a state court in San Francisco, California, alleging an injury suffered while working on board the S.S. Fordsdale in San Francisco Bay on May 21, 1946 (R. pp. 2-7). As a longshoreman, petitioner was covered by the Longshoremen's and Harborworkers' Compensation Act (33 U.S.C.A. §901, et seq.), which provides a compensation remedy against his employer, the San Francisco Stevedoring Company (R. p. 2, p. 18). His suit sought the recourse given him by the Act against persons other than his employer (33 U.S.C.A. §933). The defendant named was respondent Furness (Pacific) Limited (hereinafter referred to as "Furness"). Thereafter, on petition of Furness, a corporation of British Columbia, the case was removed (R. p. 8). In the District Court, Furness made a motion for summary judgment (R. p. 9) supported by an affidavit of James West, its general manager (R. p. 11). The motion and affidavit, which set forth that Furness was not the owner or owner *pro hac vice* of the Fordsdale and as a matter of law was not liable for petitioner's injury, were filed September 13, 1946 (R. p. 10, p. 13). On December 10, 1946, petitioner moved to add as a defendant the owner of the vessel, respondent Shaw, Savill & Albion Co., Ltd. (hereinafter referred to as "Shaw") (R. p. 13). On

March 3, 1947, the District Court made its order granting the motion and ordering that summons issue (R. pp. 16-17). Petitioner then purported to serve Shaw by leaving a copy of the summons and complaint with James West, manager of Furness, at the offices of Furness in San Francisco (R. p. 23). Respondent Shaw immediately filed a special appearance and motion to quash service (R. pp. 23-4), supported by a second affidavit of Mr. West (R. p. 25).

A hearing on the motions of both Furness and Shaw was held, at which Mr. West testified and was examined by counsel for all parties (R. p. 37 and following). The district court granted the motion of Furness for summary judgment and the motion of Shaw to quash service (R. p. 30).

The Court of Appeals for the Ninth Circuit affirmed, subject to a modification not here material (R. p. 93).

SUMMARY OF ARGUMENT

For respondent Shaw:

Contrary to the statement in the petition (Pet., p. 6, para. (1)), the Court of Appeals did not decide any question considered in *International Shoe Co. v. Washington,* 326 U.S. 310, 90 L.ed. 95 (1945). It decided only that Mr. West, the manager of Furness upon whom process against Shaw was served, was not "an officer, agent or general manager of Shaw and was not authorized to receive service of process against Shaw" (R. p. 93). Hence the case does not reach the question stated in the petition (Pet., p. 6, para. (2)). The question is not whether "a foreign shipping company which has brought a vessel into American waters * * * [can] be subjected to jurisdiction of the

local courts by the service of process upon its local agent," but whether service of process was made upon a local agent at all. Neither Mr. West nor Furness was an agent of Shaw *of any kind* when process against Shaw was served on West.

Shaw, when joined and purportedly served in this action, was not doing, and indeed had never done, business in California to the extent necessary to make it subject to jurisdiction *in personam* of state or federal courts in California.

For respondent Furness:

The petition does not properly put before this court the correctness of the judgment below as to respondent Furness. In any event, the judgment was correct.

Argument

I.

I. FOR RESPONDENT SHAW

A. Process Against Shaw Was Not Served Upon a Proper Person to Receive Service. This Is the Ground of the Decision of the Court of Appeals and Disposes of the Petition as to Shaw. The Person Served Had, When Served, No Connection with Shaw at All.

Under Federal Rule of Civil Procedure 4(d)(3), service upon a foreign corporation shall be made

> "by delivering a copy of the summons and of the complaint to *an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process* * * *." (Italics supplied.)

Under Federal Rule of Civil Procedure 4(d)(7), service upon a foreign corporation is also sufficient if

> "the summons and complaint are served * * * in the *manner prescribed by the law of the state in which the service is made* for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state." (Italics supplied.)

The relevant California statute is Section 6500 of the Corporations Code, formerly Section 406a of the Civil Code (and cited in petitioner's brief as Section 406a of the Code of Civil Procedure), providing as follows:

> "Process directed to any foreign corporation may be served upon the corporation by delivering a copy *to the person designated as its agent for service of process, or authorized to receive service of process, or to the president or other head of the corpora-*

tion, a vice president, a secretary, an assistant secretary, the general manager in this state, * * *." (Italics supplied.)

Neither Mr. West nor Furness was, when process against Shaw was served on Mr. West in San Francisco, a person described in the italicized portion of Federal Rule 4(d)(3) or of Section 6500 of the Corporations Code. *Nor was either of them then an agent of Shaw at all.* The relevant facts of record are:

(1) Shaw, a corporation of Great Britain, has never had any connection with California whatever except such as arose from the visit of the S.S. Fordsdale in April and May 1946 (R. p. 26, conceded in petitioner's brief, p. 12). The Fordsdale was ordered to San Francisco by the British Ministry of War Transport, time charterer (R. p. 26). She discharged cargo, was redelivered to her owners by the time charterer on April 24, 1946, and proceeded immediately to Portland, Oregon (ibid.). Thereafter she returned from Portland and called at Oakland and Los Angeles, California (ibid.). After the redelivery to her owners, she was in California waters a total of eight days (ibid.). She then sailed for England (R. p. 68).

(2) During the above voyage, Shaw requested Furness to act as agent for the vessel to attend to her shoreside business during her stay on the Pacific coast (R. p. 11), and Furness in fact so acted. There was no written agreement between Shaw and Furness (R. p. 12).

(3) All connection between Shaw and Furness terminated soon after the final departure of the

Fordsdale on May 26, 1946 (R. pp. 26-27) and not later than August 10, 1946, when settlement of the Fordsdale's accounts was concluded by Furness (R. p. 27). Shaw was not joined as a party to this action until March 3, 1947 (R. p. 16).

(4) When served with process against Shaw, and for some years past, Mr. West was general manager of Furness in California (R. pp. 25, 39).

Thus Furness was authorized to act, and acted, as agent of Shaw only for the limited purpose of attending to the shoreside business of the Fordsdale during her Pacific Coast calls. All such business terminated not less than seven months before Shaw was joined in the present action. The Court of Appeals rightly found (R. p. 93) that Mr. West "was not an officer, agent or general manager of Shaw and was not authorized to receive service of process issued against Shaw."

Hence, contrary to petitioner's statement (Pet., p. 6), none of the questions considered in *International Shoe Co. v. Washington, supra,* is reached in this case. There the question (among others not related to this point) was whether an agent, admittedly defendant's employee when served, was of sufficient stature to subject his employer to jurisdiction in a manner comportable with due process. Here the decisive point is that neither Furness nor West was in fact an agent of Shaw of any kind when Shaw was joined in the action.

The decisions of this court and of lower federal courts require, to support service, the existence of some agency relation at the time of service.

In *People's Tobacco Co. v. American Tobacco Co.*, 246 U.S. 79, 62 L.ed. 587 (1918) service upon a person whose employment by the defendant had terminated was held properly quashed.

In *Holland v. Parry Navigation Company, Inc.*, 1947 A.M.C. 1435, 7 F.R.D. 471 (E.D. Pa., 1947, not elsewhere reported), plaintiff, a seaman, sued Parry (his employer) for personal injuries and served Rice, Unruh & Co., the agent who handled the shoreside business of Parry vessels at Philadelphia. Quashing the service, the district court said (1947 A.M.C. at 1437):

> "I think that on May 23, 1946, when service was made on Rice, there was no relationship of principal and agent in existence between Parry and Rice. As I have previously indicated, Rice performed duties for Parry on a ship to ship basis. It seems to me that the nature of the authority conferred upon Rice by Parry can be viewed in either of two ways: First, that the authority was to exist for a specific time—namely, the duration of the vessel's stay in the Port of Philadelphia, plus any length of time prior to its arrival or subsequent to its departure during which business matters with respect to the vessel which Rice handled for Parry would normally have to be attended to; or, that the authority conferred on Rice was to perform a specified act or to accomplish a specified result—the expeditious 'turning around' of Parry's vessel. In either view of the nature of Rice's authority, I think it is clear that since Rice had completed the transaction of its last previous item of business for Parry on May 12, 1946, the authority of Rice to act as Parry's agent had terminated before May 23, 1946, when service was made on Rice. Restatement of Agency, secs. 105-106."

Accord:

Maisel v. Gdynia America Shipping Lines, Ltd., 18 F.S. 727 (W.D. N.Y., 1937).

LaVarre v. International Paper Co., 37 F.2d 141, 144 (E.D. S.C., 1929).

Johnson v. Black Diamond Lines, 36 F.S. 721 (E.D. Pa., 1941).

Coakley v. Frank A. Munsey Co., 50 F.S. 83 (D. Mass., 1943).

Spreckels Sugar Co. v. South Atlantic S. S. Line, 55 F.S. 670 (S.D. Ga., 1944).

Oro Navigation Co. v. Superior Court, 82 C.A.2d 884, 187 P.2d 444 (D.C. of A. 1947), relied upon by petitioner, is not in point. That was an action by a seaman against his employer for personal injuries. The shipping articles, which were the contract of employment, showed Oro Navigation Co. as the owner of the vessel and General Steamship Corporation Ltd., as the "Operating Mgrs." Service upon Oro was made by serving General Steamship Corporation. In holding that personal jurisdiction over Oro had been properly obtained, the court found the principal estopped to deny the agency of the person served, saying in part (187 P.2d at 446):

> "Furthermore, it is through petitioner's conduct in describing General Steamship Corporation, Ltd., as 'Operating Mgrs.' on the articles, that Anderson caused summons to be served upon General Steamship Corporation, Ltd. Code of Civil Procedure, Section 1962, subd. 3, provides: 'Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in

any litigation arising out of such declaration, act, or omission, be permitted to falsify it'."

In the present case, the record does not suggest, nor is it the fact, that Shaw ever made representations of any kind to petitioner.

B. Shaw, When Joined and Purportedly Served, Was Not, and Indeed Had Never Been, Subject to Jurisdiction in Personam of State or Federal Courts in California.

Shaw's regular course of business was in the operation of vessels between ports of the United Kingdom and ports of Australia and the Southwest Pacific (R. p. 26). Except for the visit of the Fordsdale on this one voyage, no Shaw vessel had ever visited a California port and Shaw had never had any office in California or any connection with California whatsoever (R. p. 25, conceded in petitioner's brief, p. 12). After the expiration of the time charter to the British Ministry of War Transport, the Fordsdale spent a total of about 8 days in ports of California while under the control of Shaw (R. p. 26). Petitioner, by the allegations of his complaint (R. p. 3, p. 18) is an employee of San Francisco Stevedoring Co. He has against his employer the right to recover compensation under the Longshoremen's and Harborworkers' Compensation Act (33 U.S.C.A. Sec. 901 et seq.), for the complaint on its face shows (R. p. 3, p. 18) that he is within the coverage of the Act.

Deferring consideration of the authorities for the moment, it is not "reasonable and just according to our traditional conception of fair play and substantial justice" (*International Shoe Co. v. Washington, supra,* 326

U.S. at 320, 90 L.ed. at 104) to compel Shaw to litigate petitioner's claim in a court sitting in California. Petitioner's arguments to the contrary are at best unrealistic.

Petitioner says (Br. p. 12):

> "[Shaw] can respond as easily here as anywhere else. This is more eloquently so from the standpoint of justice, because this is the only forum where petitioner can reach Shaw."

But Shaw cannot "respond as easily here as anywhere else." Neither Mr. West nor, so far as he knew, any of his employees, knew the circumstances of petitioner's injury (R. p. 71). Mr. West's first information of the injury was when he learned that petitioner had filed suit (R. p. 71). Only the crew of the vessel would have knowledge of the accident. They are employees of Shaw (R. p. 66), a corporation of Great Britain (R. p. 25) and are not, and never have been, residents of California (R. p. 27).

Nor does the record support the statement that "this is the only forum where petitioner can reach Shaw," or the statement (Br. p. 15) that "it is not possible for petitioner to reach Shaw abroad." On the contrary, no reason appears why petitioner or his attorney could not have retained a correspondent in England to press the suit. If the resources expended by petitioner to bring this case to this court had been utilized to bring suit in England, petitioner might well have had a trial on the merits before now. As the record shows, petitioner did not proceed *in forma pauperis* in the Court of Appeals.

Petitioner says (Br. p. 15): "The argument could be offered that Shaw could not be compelled to respond to any judgment since it lacked funds in the jurisdiction, but

is not the answer to that question to subject Furness to liability on behalf of Shaw?" The suggestion would compel an agent to respond for all torts of its principal. To state the proposition is to refute it.

This court has many times stated and reviewed the principles governing jurisdiction over foreign corporations. Mr. Chief Justice Stone carefully re-examined the subject in *International Shoe Co. v. Washington, supra.* The decisive question is always the same:

> At what degree of time, quantity and character do local corporate acts reach that point which justifies the assumption of power over the corporation by the local courts consistently with the basic principle that jurisdiction over the person depends on power over the person?

For purposes of this case, this question need not be accurately answered. Whatever the necessary *minima* of time, *quantum* and character, it is clear that, at least as to time and *quantum*, they were not reached here. A foreign corporation's local activities, if it has not consented to suit expressly or by operation of law, must to some extent be *continuous*, and be *substantial in amount*. Concededly these are relative terms. And the test is not solely whether the activities are "a little more or a little less." (*International Shoe Co. v. Washington, supra*, 326 U.S. at 319, 90 L.ed. at 103). But only the physical acts of the corporation manifest its presence at all, and there is no escape from examining and evaluating these in the light of the authorities.

In the following cases, the activities of a foreign corporate shipowner within a state have been held to be

below the minimum required to support personal jurisdiction of the local courts.

Holliday v. Pacific Atlantic Steamship Corp., 354 Pa. 271, 47 Atl. 2d 254 (1946);

Mason v. Moore Line Ltd., 1928 A.M.C. 1768 (D.C. Ore., 1928, not reported elsewhere).

See also:

W. Bartholomew & Co. v. Rederi A/B Gefion, 1946 A.M.C. 538 (Commissioner's Report, S.D. N.Y. 1944, not elsewhere reported);

Urlin v. W. R. Chamberlain Co., 1948 A.M.C. 84 (Sup. Ct. Wash., 1947, not elsewhere reported).

In the cases which follow the minimum has been considered reached:

Socony-Vacuum Oil Co. v. Superior Court, 35 C.A. 2d 92, 94 P.2d 1019 (D.C. of A. 1939);

Jenkins v. Lykes Bros. Steamship Co., 48 F.S. 848 (E.D. Pa. 1943);

Marcum v. Owens-Parks Lumber Co., 31 F.S. 748 (W.D. Wash. 1940).

These two groups of cases decided by inferior courts are uniformly persuasive that calls of a vessel on a single voyage at ports within a state are "casual", "isolated" or "sporadic" transactions quantitatively below the minimum required to find that the shipowner is doing business within the jurisdiction.

Furthermore, the decisions of this court compel the conclusion that Shaw never has done business in California in the required sense. In *Rosenberg Bros. v. Curtis Brown Company,* 260 U.S. 516, 67 L.Ed. 372 (1922), the plaintiff made service in New York upon the president of an Oklahoma corporation not qualified in New York and having no employees permanently there. The president was in New York on the corporate business and in fact made such trips to New York periodically. Holding the service properly quashed, this court said (260 U.S. at 518, 67 L.Ed. at 375):

> "The only business alleged to have been transacted by the company in New York, either then or theretofore, related to such purchases of goods by officers of a foreign corporation. Visits on such business, even if occurring at regular intervals, would not warrant the inference that the corporation was present within the jurisdiction of the state. Compare International Harvester Co. v. Kentucky, 234 U.S. 579, 58 L.Ed. 1479, 34 Sup. Ct. Rep. 944; People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79, 62 L.Ed. 587, 38 Sup. Ct. Rep. 233, Ann. Cas. 1918C, 537. *And as it was not found there, the fact that the alleged cause of action arose in New York is immaterial.* Compare Chipman v. Thomas B. Jeffery Co., 251 U.S. 373, 379, 64 L.Ed. 314, 316, 40 Sup. Ct. Rep. 172."

This case was cited with approval in *International Shoe Co. v. Washington, supra,* in support of the statement that (326 U.S. at 318, 90 L.Ed. at 103) "the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it * * *."

Of course legislation may provide for an approved form of substituted service on a nonresident, individual or corporate, where justified by a particular public need.

Kane v. New Jersey, 242 U.S. 160, 61 L.Ed. 222 (1916);

Hess v. Pawloski, 274 U.S. 352, 71 L.Ed. 1091 (1927).

That question is not in this case.

Oro Navigation Co. v. Superior Court, supra, relied upon by petitioner (pp. 13, 14, 24 of his brief) is in harmony with the foregoing principles. The corporation had offices in the state and officers who were residents of the state (187 P.2d pp. 446, 447). Referring to the principle under discussion, the court said (187 P.2d at page 446):

> "Judicial decisions often express this rule by stating that the corporation must 'be present' within the jurisdiction where service is made at the time of service. 'Presence' does not necessarily refer to the state wherein the articles of incorporation were filed, the location of the corporation's residence in directing the conduct of its business or the main site of operating activity. *'Presence' means transacting business which is not merely an isolated transaction.* International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057." (Italics supplied)

Even if Shaw can be said to have been present in California while the Fordsdale was there and while Furness wound up the shoreside business of the Fordsdale, it was no longer present when Shaw was joined in this action.

See:

Conley v. Mathieson Alkali Works, 190 U.S. 406, 47 L.Ed. 1113 (1903).

The visit of the Fordsdale to California occurred in April and May, 1946 (R. pp. 42-43). Furness concluded settlement of the Fordsdale's accounts in California in August, 1946 (R. p. 27). Shaw was not joined as a party to the present action until March, 1947 (R. p. 16), and had long since withdrawn from California.

II. FOR RESPONDENT FURNESS

A. The Petition Does Not Properly Put Before This Court the Correctness of the Judgment Below as to Respondent Furness.

The statement of "questions presented * * *" at page 6 of the petition deals only with the judgment below as to respondent Shaw. Rule 38(2) of this Court provides: "Only the questions specifically brought forward by the petition for writ of certiorari will be considered." This court has repeatedly said that petitions for certiorari must clearly set forth the questions sought to be reviewed by this court and that questions not so set forth will not be reviewed.

Gunning v. Cooley, 281 U.S. 90, 98, 74 L.Ed. 720 (1930);

Olson v. United States, 292 U.S. 246, 262, 78 L.Ed. 1236 (1934).

B. The Judgment Below in Favor of Respondent Furness Was Correct.

Liability in tort for injuries to invitees occurring on board ship in territorial waters is, perhaps, a matter to be governed by substantive state law.

Semble:

Caldarola v. Eckert, 332 U.S. 155, 91 L.Ed. 1968 (1947).

The law of California, however, as to maritime torts occurring in territorial waters is that, by a kind of *renvoi*, maritime substantive law applies.

Intagliata v. Shipowners & Merchants, etc. Co., 26 C.2d 365, 159 P.2d 1 (1945).

Therefore the liability, *vel non*, of Furness to petitioner is in any event to be determined by substantive maritime law, under which, whether for negligence or for unseaworthiness (*Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 90 L.Ed. 1099 (1946)), it falls upon the party in possession and control of the vessel, sometimes referred to as the owner *pro hac vice*.

The Spokane, 294 F. 242 (C.C.A. 2, 1923), cert. den. 264 U.S. 583, 68 L.Ed. 861 (1924);

In re New York Dock Co., 61 F.2d 777 (C.C.A. 2, 1932);

Vitozi v. Balboa Shipping Co., Inc., 163 F.2d 286 (C.C.A. 1, 1947).

See:

Caldarola v. Eckert, supra.

The District Court and the Court of Appeals have, in granting summary judgment for Furness, correctly held that "there is no genuine issue as to any material fact" (Rule 56 of the Federal Rules of Civil Procedure) bearing on the question of Furness' liability, because the *uncontroverted* testimony of Mr. West establishes that Furness was not an owner *pro hac vice* of the Fordsdale. Under an informal understanding not in writing, Furness undertook with Shaw, the owner, to attend to certain shoreside business of the vessel while she was in California waters (R. pp. 11-12). The crew of the vessel were employees of

Shaw, the owner (R. p. 12). Furness had no responsibility for navigation, upkeep or repair of the vessel (R. p. 13). Any repairs made in San Francisco were requested and approved by the master or chief engineer of the vessel, and Furness was not required or qualified to make any inspection (R. p. 67). The chief officer of the vessel was in charge of stevedoring operations (R. p. 68). Thus Furness was at no time in possession or control of the vessel. The evidence falls far short of the *indicia* of a demise set forth by this court in *Reed v. United States*, 78 U.S. 591, 20 L.Ed. 220 (1870).

An agent is, as petitioner says (Br. p. 24), liable for its own torts. But the courts below have decided that there is no genuine issue as to the facts and that they establish that Furness has committed no tort. This accords with the scheme and purpose of Rule 56. If by his argument (Br. pp. 24-5) petitioner means that a summary judgment may never be granted in favor of a defendant charged with negligence by the complaint, he misapprehends the purpose and effect of the Rule.

See:

Vitozi v. Balboa Shipping Co., Inc., supra.

Petitioner has had his day in court to establish a genuine issue as to any material fact bearing on Furness' liability, and has not done so.

III. FOR BOTH RESPONDENTS

A. None of the Foregoing Points Raises Any Question Calling for Granting of Certiorari.

None of the reasons stated in Supreme Court Rule 38(5)(b) for the exercise of the discretionary power to grant certiorari applies to the present case. As to Shaw, the decisive point is that in fact neither Furness nor West was the agent of Shaw when West was served with process against Shaw. Therefore, service upon Shaw was ineffective. No question of general or public importance is here involved. The question stated in the petition (page 6) is not reached. The remedy of foreign attachment was available to petitioner, as the record shows (R., p. 70), and was not used.

As to Furness, the Court of Appeals properly applied Rule 56 to effectuate a rule of maritime law amply supported by the applicable authorities and particularly by recent decisions of this court.

CONCLUSION

Respondents respectfully submit that the petition should be denied.

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